IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2017 MTWCC 3

WCC No. 2015-3585

TIM REULE

Petitioner

vs.

ANDREW N. BROCK and CHRIS M. ALBRECHT and UNINSURED EMPLOYERS' FUND

Respondents.

ORDER GRANTING THE UNINSURED EMPLOYERS' FUND'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING PETITIONER'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

Summary: The UEF moves for partial summary judgment on the grounds that there are no disputes of material fact and, as a matter of law, Petitioner is liable to reimburse the UEF for all the workers' compensation benefits it has paid or will pay on Petitioner's behalf. The UEF maintains Petitioner is liable as a statutory employer under § 39-71-405, MCA, which is Montana's "contractor-under" statute. Petitioner opposes the UEF's motion, and cross moves for partial summary judgment, arguing § 39-71-405(2), MCA, does not apply because Respondent Brock was an independent contractor, or if Petitioner is made liable by § 39-71-405(2), MCA, that statute is unconstitutional.

Held: There are no disputes of material fact; as a matter of law, Petitioner is liable as a statutory employer under §§ 39-71-405(2), and -504(1)(b), MCA, to reimburse the UEF for all the workers' compensation benefits it has paid or will pay on Petitioner's behalf; and Petitioner's constitutional challenge fails. Therefore, the UEF is entitled to judgment as a matter of law on the issue of Petitioner's liability.

¶ 1 This case is before this Court on the Uninsured Employers' Fund's (UEF) Motion for Judgment on the Pleadings, which this Court converted to a Motion for Partial Summary Judgment. During the course of this matter, Petitioner Tim Reule cross moved

for partial summary judgment. This Court held a hearing on October 12, 2016. Eric Edward Nord represented Reule. Quinlan L. O'Connor represented the UEF. R. Russell Plath represented the injured Respondent Chris M. Albrecht.

Procedural History

¶ 2 The procedural history of the motions before this Court is complicated, and many of the parties' arguments appear in filings made outside the briefing on the UEF's original motion.

¶ 3 Pursuant to § 39-71-520(2)(a), MCA, Reule petitioned this Court to contest the UEF's determination that he was Albrecht's statutory employer under § 39-71-405, MCA. He named Brock and Albrecht, as well as the UEF, as Respondents, but did not make service on Brock. Reule contends, "The nature of the dispute is whether or not Chris Albrecht was an employee of [Reule] on the date of Mr. Albrecht's injury."

¶ 4 In its Response, the UEF counterclaimed against Reule, alleging if Reule is found to be Albrecht's direct employer, then Reule is liable to reimburse the UEF under § 39-71-504(1)(b), MCA. In the alternative, the UEF alleges if Reule is found to be Albrecht's statutory employer, then Reule is liable for all benefits paid to Albrecht under § 39-71-405, MCA.

¶ 5 The UEF also filed a crossclaim against Brock, alleging if Brock is found to be Albrecht's direct employer, then Brock is liable to reimburse the UEF under § 39-71-504(1)(b), MCA.[1] The UEF attempted service on Brock but was unsuccessful.

¶ 6 On the same date as its Response, the UEF also filed a Motion for Judgment on the Pleadings, in which it argued Reule is liable for Albrecht's injury as an uninsured employer under §§ 39-71-405 and/or -504(1)(b), MCA.[2]

¶ 7 Reule opposed the UEF's motion on the grounds that it was procedurally improper, and that if he is liable under § 39-71-405, MCA, that statute is unconstitutional.[3] Reule referred to certain documents filed in the Yellowstone County District Court and attached these documents as exhibits to his brief. Following the filing of the UEF's reply brief, this Court converted the UEF's Motion for Judgment on the Pleadings to a Motion for Partial Summary Judgment pursuant to M.R.Civ.P. 12(d)[4] and gave the parties an opportunity to present all evidence material to the motion.

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[1] The UEF's crossclaim against Brock is not a subject of the UEF's motion.

[2] Docket Item No. 11. Albrecht concurred.

[3] Docket Item No. 19.

[4] This Court's conversion of the UEF's Motion for Judgment on the Pleadings to a Motion for Partial Summary Judgment renders moot Reule's argument that the former motion was procedurally improper.

¶ 8 In support of his opposition, Reule filed additional evidence, including several affidavits and a number of sealed documents, which he claimed shed light on the relationships between the parties. The UEF objected to this Court's consideration of the additional evidence, asserting it is irrelevant to the issues at hand.[5] In response to the UEF's objection, Reule offered additional arguments in opposition to the UEF's Motion for Partial Summary Judgment, and purportedly in support of his own entitlement to summary judgment.[6] The additional arguments included that § 39-71-405(2), MCA, does not apply because Brock was an independent contractor. The UEF filed a reply brief, the parties presented oral arguments on the UEF's motion and evidentiary objection, and Reule's motion, and the Court deemed the matter submitted.

¶ 9 The UEF Objection to Consideration of Reule's Documents is **overruled**. This Court considers the additional evidence to the extent of its relevance.

¶ 10 Reule, Albrecht, and the UEF are in the process of mediating the issue of Brock's employment status. However, they have agreed to stay the mediation pending the outcome of this litigation.[7]

FACTS

¶ 11 This Court has reviewed the parties' filings in their entirety, and made all inferences in Reule's favor.[8] The following facts are uncontroverted.

¶ 12 At the times relevant to this case, Reule operated under the business name Reule Builders and was a contractor who did construction work in Billings. Reule employed at least two carpenters to work on his projects.

¶ 13 Reule contracted with Brock, who operated under the business name AB Roofing and Construction, to do the roofing on Reule's projects.

¶ 14 Brock did not have an Independent Contractor Exemption Certificate (ICEC).

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[5] Docket Item No. 50.

[6] Docket Item No. 51.

[7] Although Reule requested mediation of an adverse Independent Contractor Central Unit determination of Brock's employment status, which is currently pending, Reule and the UEF have completed mediation on the issue of whether Reule is Albrecht's statutory employer. Thus, this Court has jurisdiction to decide that issue and Reule's liability, even if it requires this Court to make a determination as to Brock's employment status. *See Car Werks, LLC v. Uninsured Employers' Fund*, 2015 MTWCC 13, ¶ 17 (citation omitted) ("[W]hen a party contests the decision on initial compensability, the mediation of that issue 'encompasses all subjacent compensation issues whether or not they are specifically mentioned in the request for mediation.' ").

[8] *Morrow v. Bank of America, N.A.*, 2014 MT 117, ¶ 24, 375 Mont. 38, 324 P.3d 1167 (citation omitted) (when examining the evidence, the court is to draw all reasonable inferences in favor of the party opposing summary judgment).

¶ 15 Brock hired Albrecht to work on his roofing jobs.

¶ 16 Reule did not supervise or direct Albrecht, provide Albrecht with any tools or equipment, or pay Albrecht.

¶ 17 Rather, Brock supervised and directed Albrecht, provided Albrecht with tools and equipment, and paid Albrecht.

¶ 18 In September 2014, Reule was the contractor for a job at a residence in Billings. Reule contracted with Brock to do the roofing.

¶ 19 On September 12, 2014, Albrecht was working as a roofer on the project. At approximately 10:30 a.m., Albrecht fell off the roof and suffered injuries.

¶ 20 Reule's "lead carpentry man" was at the job site, but did not witness the accident because he was on the other side of the building.

¶ 21 Albrecht filed a workers' compensation claim. On his First Report of Injury or Occupational Disease, Albrecht listed his employer as "Andrew Brock – subcontractor," and "Tim Reule – contractor."

¶ 22 At the time of Albrecht's injury, Brock did not have workers' compensation insurance.

¶ 23 At the time of Albrecht's injury, Reule did not have workers' compensation insurance.

¶ 24 Because neither Brock nor Reule had workers' compensation coverage, Albrecht's claim was tendered to the UEF, which accepted liability. During its investigation, the UEF determined that Brock was Reule's roofing subcontractor, and that Brock hired Albrecht.

¶ 25 On October 22, 2014, the UEF sent a letter to Brock stating, in relevant part:

> As [Albrecht's] employer, pursuant to Sections 39-71-504 and 39-71-405, MCA, the Uninsured Employers' Fund (UEF) may recover an amount equal to all benefits paid or to be paid to the claimant pursuant to the Montana Workers' Compensation Act, together with related necessary expenses, from you as the employer primarily liable therein. Based on all documentation received to date, UEF found the claim to be compensable and are [sic] initiating benefits to Mr. Albrecht under a full reservation of rights.
>
> Pursuant to the two attached letters dated, [sic] this claim is being tendered to Tim Reule in accordance with Section 39-71-405, MCA. Since Tim Reule

has been found to be responsible for this claim pursuant to Section 39-71-405, MCA, he has a statutory right to demand reimbursement from you for all costs and related necessary expenses on this claim. If this case moves forward to court and he is found not to be responsible then you would become directly liable to the UEF for all benefits paid on this claim.

¶ 26 Also on October 22, 2014, the UEF wrote a letter to Reule, stating, in relevant part:

> The Uninsured Employers' Fund (UEF) received the attached First Report of Injury form regarding the above referenced claim. It appears Andrew Brock did not have a workers' compensation policy in effect at the time of Mr. Albrecht's injury.
>
> As the statutory employer, in accordance with Section 39-71-405, MCA, we are tendering this claim to you. A thorough review of the Department's files failed to locate any workers' compensation coverage in effect for your firm at the time of the injury. Since we have been unable to locate coverage for you, this claim will be administered by UEF.
>
> In accordance with Section 39-71-504, MCA, you are required to pay an amount equal to all benefits paid or to be paid pursuant to the Montana Workers' Compensation Act, together with related necessary expenses. In addition to claim cost reimbursement, you will accrue interest at 12% per year on the unpaid balance.
>
> . . . .
>
> In addition, pursuant to Sections 39-71-503(3)(c), and 39-71-508(3), MCA, the medical expenses payable by the UEF is [sic] limited to a maximum of $100,000 on this claim. Be advised, you will become directly liable to all medical providers for any amounts that exceed that amount.

LAW AND ANALYSIS

¶ 27 This case is governed by the 2013 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect at the time of Albrecht's industrial accident.[9]

¶ 28 This Court renders summary judgment when the moving party demonstrates an absence of a genuine issue of material fact and entitlement to judgment as a matter of law.[10] After the moving party meets its initial burden to show the absence of a genuine

[9] *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

[10] ARM 24.5.329(2).

issue of fact and entitlement to judgment, the burden shifts to the party opposing summary judgment either to show a triable issue of fact or to show why the undisputed facts do not entitle the moving party to judgment.[11]

Issue 1: Is Reule liable to reimburse the UEF for all the workers' compensation benefits it has paid or will pay on Reule's behalf for Albrecht's claim?

¶ 29 The majority of states, including Montana, have adopted a "contractor-under" statute, which imposes workers' compensation liability on a general contractor to the employees of a subcontractor if the subcontractor is uninsured.[12] In *Larson's Workers' Compensation Law*, Professor Larson explains the purpose of these statutes is "to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on the presumably responsible principal contractor, which has it within its power, in choosing subcontractors, to pass upon their responsibility and insist upon appropriate compensation protection for their workers."[13] The statute also aims "to forestall evasion of the act by those who might be tempted to subdivide their regular operations among subcontractors, thus escaping direct employment relations with the workers and relegating them for compensation protection to small contractors who fail to carry . . . compensation insurance."[14] Professor Larson also explains, "It has become quite common to speak of the general contractor's liability as that of the 'statutory employer' to a 'statutory employee.' "[15]

¶ 30 Montana's "contractor-under" statute is § 39-71-405, MCA. It sets forth the circumstances under which a general contractor who contracts work out is made liable as a statutory employer, and breaks them down based on whether the subcontractor is an "independent contractor" or a "contractor." In pertinent part, it provides:

> **Liability of employer who contracts work out**. (1) An employer who contracts with an independent contractor to have work performed of a kind which is a regular or a recurrent part of the work of the trade, business, occupation, or profession of such employer is liable for the payment of benefits under this chapter to the employees of the contractor if the contractor has not properly complied with the coverage requirements of the Worker's Compensation Act. Any insurer who becomes liable for payment

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[11] *Amour v. Collection Prof'ls, Inc.*, 2015 MT 150, ¶ 7, 379 Mont. 344, 350 P.3d 71 (citation omitted).

[12] 6 Lex K. Larson, Larson's Workers' Compensation § 70.01 (Matthew Bender, Rev. Ed.) (citations omitted).

[13] 6 Lex K. Larson, Larson's Workers' Compensation § 70.04 (Matthew Bender, Rev. Ed.) (citations omitted).

[14] 6 Lex K. Larson, Larson's Workers' Compensation § 70.05 (Matthew Bender, Rev. Ed.) (citations omitted).

[15] 6 Lex K. Larson, Larson's Workers' Compensation § 70.03 (Matthew Bender, Rev. Ed.).

> of benefits may recover the amount of benefits paid and to be paid and necessary expenses from the contractor primarily liable therein.
>
> (2) Where an employer contracts to have any work to be done by a contractor other than an independent contractor, and the work so contracted to be done is a part or process in the trade or business of the employer, then the employer is liable to pay all benefits under this chapter to the same extent as if the work were done without the intervention of the contractor, and the work so contracted to be done shall not be construed to be casual employment. Where an employer contracts work to be done as specified in this subsection, the contractor and the contractor's employees shall come under that plan of compensation adopted by the employer.[16]

¶ 31 The UEF makes three alternative arguments in support of its position that Reule must reimburse it for Albrecht's benefits. First, the UEF argues because Brock did not have an ICEC, he was not an independent contractor. The UEF maintains Brock was a contractor and this case therefore falls under § 39-71-405(2), MCA. Thus, the UEF maintains Reule is liable to pay all benefits "as if the work were done without the intervention of" Brock; i.e., the UEF argues Reule is Albrecht's statutory employer. Since Reule did not have workers' compensation insurance, the UEF maintains he is an uninsured employer liable to reimburse the UEF for all benefits paid on Albrecht's claim under § 39-71-504(1)(b), MCA, which states:

> The fund shall collect from an uninsured employer an amount equal to all benefits paid or to be paid from the fund to or on behalf of an injured employee of the uninsured employer.

¶ 32 Second, the UEF argues even if Brock was an independent contractor, and this case therefore falls under § 39-71-405(1), MCA, Reule is liable for Albrecht's benefits because Brock was uninsured. The UEF argues since Reule was uninsured, he is liable to the UEF under § 39-71-504(1)(b), MCA.

¶ 33 Third, the UEF argues if Reule was Albrecht's direct employer, then Reule is liable to the UEF under § 39-71-504(1)(b), MCA.

¶ 34 Reule counters the UEF's first argument by asserting Brock was an independent contractor. In documents the UEF submitted to the district court in Albrecht's tort claim against Reule and Brock, Reule claims the UEF judicially admitted Brock was Albrecht's employer and Reule's independent contractor — even hinting at a causal relationship between the two — and contends the UEF is judicially estopped from arguing otherwise. Reule further maintains the fact that Brock did not have an ICEC is only one factor this Court should consider in determining Brock's status. He argues this Court must apply the

[16] § 39-71-405, MCA.

"AB" Test — under which a person is an independent contractor if he is (a) free from the prime contractor's control and (b) engaged in an independent business or trade[17] — and the factors set forth in ARM 24.35.302 and .303, and based on the evidence, determine Brock was an independent contractor. Reule thus maintains § 39-71-405(2), MCA, is inapplicable because it does not apply when the subcontractor is an independent contractor, and he is entitled to judgment as a matter of law. Reule cites *Walling v. Hardy Construction*,[18] and argues it supports his position. Notwithstanding, Reule contends if he is made liable under § 39-71-405(2), MCA, that statute is unconstitutional.

¶ 35 As for the UEF's second argument, Reule conceded at the hearing the UEF's interpretation of § 39-71-405(1), MCA, was "a fair reading" of the statute, but argued that statute is unconstitutional, too.

¶ 36 Regarding the UEF's third argument, Reule reiterates that the UEF judicially admitted Brock was Albrecht's employer and contends it is judicially estopped from arguing otherwise. Moreover, he argues there is no evidence Reule was Albrecht's direct employer.

Brock Was Not an Independent Contractor, But Rather a Contractor

¶ 37 This Court agrees with the UEF that, as a matter of law, Brock was not an independent contractor. Since this ruling is dispositive, this Court does not reach the UEF's others arguments. This Court rejects Reule's arguments that Brock was an independent contractor for two reasons.

¶ 38 First, the UEF never made a judicial admission that Brock was an independent contractor, nor is it judicially estopped from arguing that Brock was not an independent contractor. "A judicial admission is an express waiver made to the court by a party or its counsel 'conceding for the purposes of trial the truth of an alleged fact.' "[19] "Judicial estoppel precludes a party to an action or proceeding from taking a position inconsistent with the party's previous judicial declarations."[20] In the documents on which Reule relies, the UEF stated Brock was a subcontractor of Reule and Brock was Albrecht's direct employer. Based upon the evidence submitted to this Court, including the evidence Reule submitted in support of his position, these statements are true and correct. However, there is no causal relationship between being an employer and an independent contractor; i.e., the fact that Brock was Albrecht's direct employer does not

[17] *See Am. Agrijusters Co. v. Dep't of Labor and Indus.*, 1999 MT 241, ¶ 19, 296 Mont. 176, 988 P.2d 782 (citation omitted).

[18] 247 Mont. 441, 807 P.2d 1335 (1991).

[19] *Bilesky v. Shopko Stores Operating Co., LLC*, 2014 MT 300, ¶ 12, 377 Mont. 58, 338 P.3d 76 (citation omitted).

[20] *Gibbs v. Altenhofen*, 2014 MT 200, ¶ 17, 376 Mont. 61, 330 P.3d 458 (citation omitted).

mean that Brock was an independent contractor.[21] Moreover, despite Reule's claim to the contrary, the UEF is not taking a position that is "fundamentally at odds" with its statement that Brock was a subcontractor of Reule. Under § 39-71-405, MCA, a subcontractor can be either an independent contractor or a contractor. The UEF never referred to Brock as an independent contractor.

¶ 39 Second, the statutory requirements to be an independent contractor have undergone significant changes in recent years, and Brock is not an independent contractor under the new scheme. In *Wild v. Fregein Construction*,[22] which the Montana Supreme Court decided in 2003, Kelly Wild was granted an ICEC in connection with his business as a roofing contractor.[23] However, at that time, all a person had to do to obtain an ICEC was to swear to the Department of Labor & Industry (DLI) that he was an independent contractor.[24] Thus, Wild's ICEC stated, "This certificate does not relieve the hiring agent of its responsibility for establishing that a person is an independent contractor."[25] It also stated that if the individual did not pass both parts of the AB test, "the employer must ensure workers' compensation coverage exists prior to hiring."[26] When Wild's roofing business failed, he approached Russ Fregein, who had his own roofing company, looking for work.[27] Fregein offered Wild a choice to work for $15 per hour as a "legit" employee, or $20 per hour to work as an independent contractor.[28] Wild chose to work as an independent contractor, but the evidence showed "Wild was clearly an employee and not an IC."[29] Shortly thereafter, Wild was seriously injured when he fell off a roof.[30] His ICEC was in effect at the time of his accident.[31] Wild filed a workers' compensation claim, but this Court ruled he was not entitled to benefits because "the existence of the exemption previously issued to Wild when he owned his own roofing

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[21] To the extent Reule's argument — that the UEF judicially admitted Brock was Albrecht's employer and is therefore judicially estopped from claiming Reule was "the employer" — does not relate to the aforementioned "causal relationship," this Court assumes it was intended only to counter the UEF's third argument, not to suggest workers' compensation liability may only be imposed on a direct employer. As discussed further below, § 39-71-405, MCA, was specifically intended to impose liability on "statutory employers," who are by definition not claimants' direct employers.

[22] 2003 MT 115, 315 Mont. 425, 68 P.3d 855.

[23] *Wild*, ¶ 7.

[24] *Wild*, ¶ 51 (Rice, J., specially concurring).

[25] *Id.* (italics omitted).

[26] *Id.* (italics omitted).

[27] *Wild*, ¶ 8.

[28] *Wild*, ¶ 9.

[29] *Wild*, ¶¶ 9, 35.

[30] *Wild*, ¶ 6.

[31] *Wild*, ¶ 7.

business conclusively precluded a post-injury factual inquiry into whether claimant was in fact an independent contractor or an employee."[32]

¶ 40 The Supreme Court reversed.[33] The court noted there were several statutes in conflict.[34] While § 39-71-401(3)(c), MCA (1999), stated an ICEC was "conclusive as to the status of an independent contractor and precludes the applicant from obtaining [workers' compensation] benefits," § 39-71-120, MCA (1999), which featured the language for which the AB test is named,[35] defined "independent contractor" as:

> one who renders service in the course of an occupation and:
>
> (a) has been and will continue to be free from control or direction over the performance of the services, both under the contract and in fact; and
>
> (b) is engaged in an independently established trade, occupation, profession, or business.

The court also noted employers are required to purchase workers' compensation insurance, and employees may not waive coverage.[36] The court resolved the conflicts by holding that having an ICEC did not "conclusively preclude any factual inquiry into whether an employer/employee relationship exists."[37] The court also held an employer had an obligation to determine, using the AB test, whether individuals are independent contractors or employees, and to treat them accordingly.[38] Since Wild was actually working as an employee, the court held that he was entitled to workers' compensation benefits.[39]

¶ 41 In response to *Wild* and the uncertainty it created, the 2005 Legislature repealed § 39-71-120, MCA, and, among other provisions, enacted §§ 39-71-417 and -419, MCA — legislation that effectively reversed *Wild* and restored the conclusive determination of an ICEC.[40] The DLI also amended its administrative rules to provide for a more robust

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[32] *Wild*, ¶¶ 12-13 (citation omitted) (internal quotation marks omitted).

[33] *Wild*, ¶ 1.

[34] *Wild*, ¶ 21.

[35] *See Thoreson v. Uninsured Employers' Fund*, 2000 MTWCC 40, ¶ 37 (applying the 1995 version of § 39-71-120, MCA, which is, in pertinent respects, identical to the 1999 version) (citation omitted).

[36] *Wild*, ¶ 21.

[37] *Wild*, ¶ 29.

[38] *Wild*, ¶¶ 25-28.

[39] *See Wild*, ¶ 35.

[40] *See* S. 108, 59th Leg. (Mont. 2005).

departmental evaluation to determine whether a person is truly an independent contractor and therefore entitled to an ICEC.[41]

¶ 42 Under the new scheme, a person who regularly and customarily performs services at a location other than the person's own fixed business location must either apply for and obtain an ICEC, or purchase workers' compensation insurance for himself.[42] Upon receipt of an application for an ICEC, the DLI conducts an extensive evaluation to determine if the person is truly an independent contractor.[43] The DLI has the authority to suspend or revoke an ICEC if it determines that the person is actually working as an employee.[44]

¶ 43 If the DLI determines that the person is an independent contractor and approves the application, the person is conclusively presumed to be an independent contractor when working under the ICEC,[45] meaning the person is working in the occupation listed on the ICEC and has not agreed to work as an employee.[46] The law is clear that a person may not work as an independent contractor without an ICEC or insuring himself; § 39-71-419(1), MCA, states:

> A person may not:
>
> (a) perform work as an independent contractor without first:
>
> (i) obtaining from the department an independent contractor exemption certificate unless the individual is not required to obtain an independent contractor exemption certificate pursuant to 39-71-417(1)(a); or
>
> (ii) electing to be bound personally and individually by the provisions of compensation plan No. 1, 2, or 3[.]

¶ 44 The UEF is correct that to be an independent contractor for purposes of workers' compensation under the new scheme, Brock was required either to obtain an ICEC through the DLI's procedures or insure himself with workers' compensation insurance. Once this Court converted the UEF's Motion for Judgment on the Pleadings to a Motion for Partial Summary Judgment, and granted the parties the opportunity to present additional evidence, it became incumbent upon Reule to come forward with evidence to

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[41] *See* ARM 24.35.101 through .303.

[42] § 39-71-417(1)(a)(i), MCA.

[43] *See* ARM 24.35.111.

[44] ARM 24.35.131.

[45] § 39-71-417(7), MCA.

[46] § 39-71-417(7)(c), MCA.

contradict the UEF's primary argument that Brock was not an independent contractor.[47] Reule provided neither evidence that Brock had an ICEC for roofing in place at the time of Albrecht's accident, nor evidence that Brock had workers' compensation insurance during the same time. Thus, Reule failed to meet his burden of establishing an issue of fact. As a result, Brock was not an independent contractor as a matter of law; rather, he was a contractor.[48]

¶ 45 Reule's reliance on *Walling* is misplaced. There, Hardy Construction, a general contractor, subcontracted with Jess Walling, proprietor of Walling Construction, for concrete work.[49] Walling provided workers' compensation insurance for his employees but, as allowed by law, declined coverage for himself.[50] After suffering a severe injury at the construction site, Walling claimed he was eligible for workers' compensation benefits, either as an employee of Hardy Construction or, pursuant to § 39-71-405(2), MCA, as an employee of Walling Construction.[51] The Supreme Court first looked to the definition of "independent contractor" in § 39-71-120, MCA, applied the AB test, and held that Walling was an independent contractor and, therefore, not entitled to workers' compensation benefits as an employee of Hardy Construction.[52] The court also held that Walling could not recover benefits under § 39-71-405(2), MCA, because that subsection applies only when the contractor is not an independent contractor.[53]

¶ 46 Reule argues under *Walling*, this Court should rule on the evidence presented that Brock was an independent contractor under the AB test, and therefore conclude that § 39-71-405(2), MCA, does not apply. Or, if this Court determines the current evidence is insufficient or disputed, Reule argues it should hold a trial to determine whether Brock was an independent contractor under the AB test. Notwithstanding, *Walling* is not on point because it predates the new scheme, one of the purposes of which is to avoid post-injury factual inquiry into whether a person was an independent contractor under the AB test.[54]

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[47] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (holding that the party moving for summary judgment may meet its initial burden "by 'showing' — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case").

[48] *See Blacktail Mountain Ranch, Co. v. Dep't of Natural Res. & Conservation*, 2009 MT 345, ¶ 7, 353 Mont. 149, 220 P.3d 388 (citation omitted) ("Summary judgment is proper when a non-moving party fails to make a showing sufficient to establish the existence of an essential element of its case on which it bears the burden of proof at trial.").

[49] *Walling*, 247 Mont. at 445, 807 P.2d at 1337.

[50] *Id.*

[51] *Walling*, 247 Mont. at 446, 451, 807 P.2d at 1338, 1341.

[52] *Walling*, 247 Mont. at 447-50, 807 P.2d at 1338-40.

[53] *Walling*, 247 Mont at 451-52, 807 P.2d at 1341.

[54] *See* ¶ 41 and note 41 above.

Reule Is Liable to Reimburse the UEF under §§ 39-71-405(2) and -504(1)(b), MCA

¶ 47 Because Reule contracted to have roofing services, which are part of his building business, done by a contractor other than an independent contractor, he is liable as a statutory employer by operation of § 39-71-405(2), MCA, to pay workers' compensation benefits to the same extent as if the work were done without Brock's intervention, i.e., as if Albrecht had done the work as an employee of Reule.[55] As stated in *State Compensation Ins. Fund v. Castle Mountain Corp*., § 39-71-405(2), MCA, "essentially grants workers' compensation insurance coverage to a non-independent contractor employee in the same manner as if there were no intervening non-independent contractor."[56]

¶ 48 Pursuant to § 39-71-401, MCA, an employer must have workers' compensation insurance unless the employment is specifically exempted by the statute. Reule meets the definition of "employer" under the WCA, which includes a "prime contractor . . . who has a person in service under an appointment or contract of hire, expressed or implied, oral or written . . . ."[57] Where an employer has not properly complied with the provisions of § 39-71-401, MCA, the employer is considered "uninsured."[58] The UEF steps in to pay the injured employee the same benefits, with some exceptions and limitations, the employee would have received if the employer had been properly insured,[59] and is authorized by statute to seek reimbursement from the uninsured employer.[60]

¶ 49 Since Reule was Albrecht's statutory employer under § 39-71-405(2), MCA, he was required to have workers' compensation insurance for Albrecht unless the employment was specifically exempted under § 39-71-401(2), MCA. The employment at issue in this matter — roofing — is not listed as one of the exempted employments. Reule did not have workers' compensation insurance at the time of Albrecht's injury, so the UEF stepped in to pay Albrecht on Reule's behalf. The UEF correctly determined that Reule was Albrecht's statutory employer and, pursuant to § 39-71-504(1)(b), MCA, the UEF is entitled to reimbursement from Reule. Accordingly, the UEF, and not Reule, is entitled to judgment as a matter of law on the issue of Reule's liability.

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[55] *See* § 39-71-405(2), MCA.

[56] 227 Mont. 236, 240, 739 P.2d 461, 464 (1987).

[57] § 39-71-117(1)(a), MCA.

[58] § 39-71-501, MCA.

[59] § 39-71-503, MCA.

[60] § 39-71-504, MCA.

Issue 2: Is § 39-71-405(2) unconstitutional because it violates Reule's entitlement to the equal protection of law?

¶ 50 Under the Fourteenth Amendment to the United States Constitution, and Article II, Section 4, of the Montana Constitution, no person shall be denied equal protection of the laws. "The basic rule of equal protection is that persons similarly situated with respect to a legitimate governmental purpose of the law must receive like treatment."[61]

¶ 51 Analysis of an equal protection claim involves multiple steps, including: "identifying the classes involved, determining whether they are similarly situated and then using the appropriate level of scrutiny to determine if the statute is constitutional."[62] "If the classes at issue are not similarly situated, then the first criteria for proving an equal protection violation is not met and [the Court] need look no further."[63]

¶ 52 Reule raises two arguments that § 39-71-405(2), MCA, violates his entitlement to the equal protection of law. First, Reule argues while other Montana laws protect individuals from being held liable for the actions of others without agreement or a finding of culpability,[64] § 39-71-405(2), MCA, seeks to hold prime contractors accountable for the actions or debts of their subcontractors without affording the prime contractors similar protections.

¶ 53 However, the UEF is correct that Reule's liability for workers' compensation benefits is not premised on Brock's actions, but rather on his own: hiring an uninsured subcontractor. As noted above, the purpose of § 39-71-405, MCA, is to deter prime contractors from hiring uninsured subcontractors.[65] The Montana Supreme Court has recognized that this is the purpose of § 39-71-405, MCA, and that this statute "reflects the general purpose of Montana's workers' compensation laws, to provide for the protection of workers."[66] Therefore, Reule is liable for allowing an uninsured subcontractor to work on his jobsite, a situation over which Reule had complete control, and no disparate treatment exists between prime contractors and everyone else.

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[61] *Rausch v. State Comp. Ins. Fund*, 2005 MT 140, ¶ 18, 327 Mont. 272, 114 P.3d 192.

[62] *Bustell v. AIG Claims Serv., Inc.*, 2004 MT 362, ¶ 20, 324 Mont. 478, 105 P.3d 286 (citation omitted).

[63] *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 22, 302 Mont. 518, 15 P.3d 877.

[64] *See* § 28-11-101, MCA; § 1-3-211, MCA.

[65] *See* ¶ 29 and note 14 above. *See also Webb v. Montana Masonry Constr. Co.*, 233 Mont. 198, 210, 761 P.2d 343, 350 (1988) (explaining that insured prime contractor could not rely upon the exclusive remedy because "If we . . . immuniz[e] owners and contractors from liability for their negligence because they had paid or are subject to paying compensation for their noncomplying contractors or subcontractors, we will be rewarding them for not requiring the immediate employers of injured working men to comply with the spirit as well as the letter of the Act.").

[66] *State Comp. Ins. Fund v. Castle Mountain Corp.*, 227 Mont. 236, 240, 739 P.2d 461, 464 (1987).

¶ 54 Second, Reule argues while Article II, Section 16 of the Montana Constitution offers tort immunity to direct employers via the exclusive remedy of the WCA, § 39-71-405(2), MCA, fails to extend protection from tort liability to statutory employers like him. But, as an uninsured employer, Reule has not challenged the disparate treatment of two similarly situated groups. Article II, Section 16 does offer tort immunity to direct employers, but importantly, only to direct employers who "provide[ ] coverage under the Work[ers'] Compensation Laws of this state." Thus, a direct employer who fails to furnish workers' compensation coverage is treated identically as Reule; neither is entitled to tort immunity.[67]

¶ 55 As a result of his failure to challenge the disparate treatment of similarly situated classes, Reule's constitutional challenge to § 39-71-405(2), MCA, based on a violation of his right to equal protection, fails.

JUDGMENT

¶ 56 The UEF's Motion for Partial Summary Judgment is **granted**.

¶ 57 Petitioner's Cross Motion for Partial Summary Judgement is **denied**.

DATED this 11th day of April, 2017.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Eric Edward Nord
R. Russell Plath
Quinlan L. O'Connor

Submitted: October 12, 2016

[67] *See* § 39-71-411, MCA (extending exclusive remedy only to employers who have provided workers' compensation coverage). *See also Webb*, 233 Mont. at 211, 761 P.2d at 351 (Weber, J., specially concurring) ("Following the *quid pro quo* theory, Montana Masonry [claimant's direct employer] under our statutes will not be granted immunity from tort liability because of its failure to furnish workers' compensation coverage.").